

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

AT BECKLEY

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE, *et al.*

Defendants,

v.

SOUTH FORK COAL COMPANY, LLC,

Defendant-Intervenor.

Civil Action No. 5:24-cv-00274 (Judge Volk)

DECLARATION OF JAMES B. KOTCON, PH.D.

I, James Kotcon, state and declare as follows:

1. The following facts are personally known to me and if called as a witness I could and would truthfully testify to these facts.

2. I live in Monongalia County, West Virginia.

3. I am an Associate Professor Emeritus at West Virginia University, where I have taught courses in plant science, environmental impact assessment, fruit pathology, and nematology. I also advise graduate and undergraduate students and direct scientific research.

4. I earned my Ph.D. in Plant Pathology from the University of Wisconsin-Madison in 1983. Prior to that, I earned my Master of Science from Michigan State University in 1979,

and I earned my Bachelor of Science from the University of Wisconsin – Stevens Point, where I majored in biology and minored in chemistry.

5. I have been a member of the West Virginia Chapter of the Sierra Club since 1986. The Sierra Club is a nonprofit corporation with more than 683,000 members and supporters nationwide. The West Virginia Chapter of the Sierra Club was founded in 1984. We just celebrated our fortieth year, and we currently have 2,240 chapter members.

6. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club's concerns encompass the exploration, enjoyment, and protection of forests and surface waters in West Virginia.

7. I currently serve as the Chair of the Sierra Club West Virginia Chapter. Previously, I served in this role from 2016 to 2017 and from 1992 to 1994. I have held many other past roles with the Sierra Club West Virginia Chapter, including serving as the Legislative Chair (1990 to 1991, 1994 to 2009), Political Chair (1990 to 2003), and the Chair of the Monongahela Group (1986 to 1988, 2010 to 2011).

8. The Monongahela Group of the Sierra Club West Virginia Chapter works to increase awareness of environmental issues affecting the Monongahela National Forest and provide opportunities for active participation in it, which can involve volunteering, joining and leading outings, helping with an event or group function, or becoming an activist and lobbying for change.

9. In the 1980s and 1990s, the Sierra Club West Virginia Chapter ran the Monongahela National Forest Trail Recovery Program, a cooperative group where the Sierra Club West Virginia Chapter has performed trail maintenance for the Monongahela National Forest with volunteers. The Sierra Club West Virginia Chapter also volunteers with tree-planting forest restoration projects there.

10. The Sierra Club West Virginia Chapter participates in activism in forest planning and timber sales on the Monongahela National Forest. It has been active in opposing off-road vehicle trails on the forest. The Sierra Club West Virginia Chapter also has a climate forest campaign to protect old growth trees on the forest. Recently, this campaign has been actively engaged in work surrounding the National Old Growth Amendment and its impacts on old growth eastern forests like those in the Monongahela National Forest.

11. The Sierra Club West Virginia Chapter engages in water quality work, including monitoring streams impacted by coal mining. We advocate for legislation protecting forest waters from timber harvest and soil erosion.

12. The Sierra Club West Virginia Chapter is a founding organization in the West Virginia Rivers Coalition, which leads water quality and river protection efforts.

13. The Sierra Club West Virginia Chapter conducts regular outings on the Monongahela National Forest, including camping, hiking, and cross-country skiing trips. Some of my favorite memories are the hikes and camping trips with new friends and like-minded members in the Monongahela National Forest.

14. I am the Faculty Advisor for the Sierra Student Coalition at West Virginia University, which is an official branch of the Sierra Club's National Sierra Student Coalition.

The West Virginia University Sierra Student Coalition aims to protect the environment through sharing knowledge on legislation, proposed projects, and activism opportunities.

15. The West Virginia University Sierra Student Coalition holds regular on-campus meetings and conducts outings. Those outings include volunteer work, like trail maintenance and tree planting, as well as recreation like hiking and skiing. Some of our outings take place in the Monongahela National Forest.

16. I love to visit the Monongahela National Forest for its scenic views and to hike and fish. One of the reasons I value protecting the Monongahela National Forest it is that the headwaters for several important rivers, including the Cherry River. I enjoy visiting these headwaters, including the South Fork Cherry and North Fork Cherry Rivers, because of their pristine water quality and rich biodiversity.

17. I am passionate about biodiversity and appreciate the Monongahela National Forest for its tremendous amount of it. Having both studied and taught nematology, I have found interesting nematodes and other invertebrate species while recreating on the Monongahela National Forest and its rivers.

18. I first visited the Cherry River watershed in 1986 and have visited it half a dozen times. I have joined previous Sierra Club outings in the Cranberry Glades and driving the North Fork of the Cherry River along the Highlands Scenic Highway.

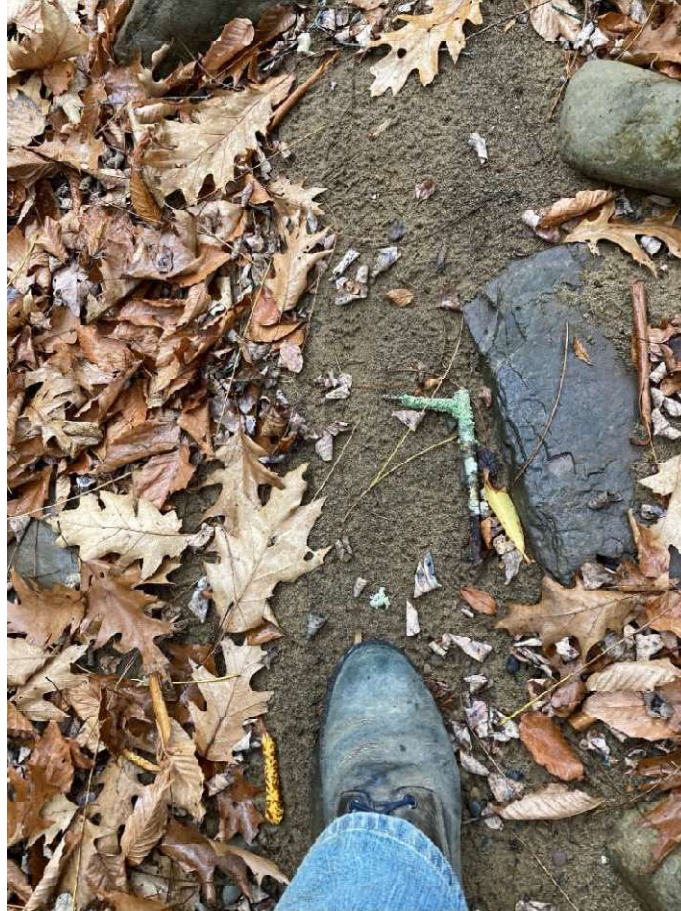
19. Most recently, I visited it on November 10, 2024. That day, members of West Virginia Sierra Club met at the Cranberry Glades boardwalks to enjoy the cranberries and other unique botanical life. We took a scenic hike in the Falls of Hills Creek area, then we went sightseeing down the North Fork Cherry River. We drove along the access road, Forest Service

Road 223, stopping for scenic views along the way. We then drove the South Fork Cherry River for sightseeing.



Photograph taken by Jim Kotcon on November 10, 2024

20. We stopped periodically to enjoy the streams and look for candy darters. While viewing the streams connected to the South Fork Cherry River, I noticed that there was sandy sediment built up among the rocks.



Photograph taken by Jim Kotcon on November 10, 2024

21. I also noticed that Forest Service Road 223 was not covered in rock or gravel but soft sand and dirt. I am concerned about run-off from this road if the area receives precipitation.

22. I plan to visit the areas around the North and South Forks of the Cherry River again in May 2025 when the wildflowers are blooming. During that trip, I look forward to looking for, and hopefully seeing, the candy darter.

23. I visited the forest roads at issue in this case approximately ten years ago, Forest Service Road 249 and Forest Service Road 223, before the coal hauling at issue began. These roads are important to me, my students, and Sierra Club West Virginia Chapter members because, when they are open, they provide public access to the surrounding forest. Indeed, many

members of the Sierra Club West Virginia Chapter that live close to the Cherry River watershed frequent it for personal and chapter-led outings and use these roads for access.

24. The members of the Sierra Club West Virginia Chapter and I are passionate about protecting the endangered candy darter and its habitat, both for its intrinsic value as a species and because the candy darter is an important indicator species for water quality. In fact, we were active in opposing the Mountain Valley Pipeline due to its impacts to the candy darter habitat.

25. Whenever I visit the Cherry River watershed, I hope to see the candy darter, a beautifully colored fish. I derive scientific, recreational, conservation, and aesthetic benefits from the candy darter, and it reassures me to know that the candy darter and its habitat are protected. Any actions that could harm the candy darter or detrimentally impact its habitat would interfere with my use and enjoyment of the Cherry River watershed, the Monongahela National Forest, and this imperiled species.

26. Likewise, the interests of the Sierra Club West Virginia Chapter are lessened and threatened by activities that harm the candy darter, including coal hauling and roadwork through the candy darter's habitat, including its interests in recreating in, enjoying, researching, and conserving these areas.

27. We are concerned because the coal hauling and extensive road work taking place under the Road Use Permit issued to South Fork Coal Company, LLC by the U.S. Forest Service can cause and is causing pollution, runoff, and sedimentation, and other harm to the freshwater streams in the Cherry River watershed where the candy darter lives.

28. On behalf of myself and the Sierra Club West Virginia Chapter, I am distressed by the fact that the U.S. Forest Service is allowing activities to take place that are harming the candy darter's habitat and pushing it even further towards extinction. I am also harmed because,

after years of advocating for the candy darter, it finally has protected habitat, but the Forest Service has not taken the actions required to provide the candy darter with the on-the-ground protections that it needs.

29. Along with other members of the Sierra Club West Virginia Chapter, I am also keenly interested in observing and protecting bats.

30. When I visit the Monongahela National Forest, I enjoy looking for and watching bats – especially northern long-eared bats and the Indiana bats.

31. I have reviewed literature on the impacts on bat species from white-nose syndrome, a condition caused by a deadly invasive fungus that has decimated bats across the United States and Canada. Both the northern long-eared bat and the Indiana bat have suffered enormous population losses from white-nose syndrome.

32. I believe that protecting the habitat of these bats, including the intact conifer and red spruce forests and clear streams of the Monongahela National Forest, is integral to helping Indiana bats and northern long-eared bats withstand the ongoing threat of white-nose syndrome unless and until a cure is found. Bats play a critical role in maintaining a healthy ecosystem, so protecting them is important to me because they help preserve the forest, too.

33. I derive scientific, recreational, conservation, and aesthetic benefits from northern long-eared bats and Indiana bats as well as their habitat in the Monongahela National Forest. Any actions that harm these bats or their habitat would interfere with my use and enjoyment of them and the Monongahela National Forest.

34. Likewise, the interests of the Sierra Club West Virginia Chapter are lessened and threatened by coal hauling and roadwork through the northern long-eared bat and Indiana bat's

habitats, including its long-standing interests in recreating in, enjoying, researching, and conserving these areas.

35. We are concerned that noise disturbance from coal hauling, increased truck traffic, and extensive road work, along with vegetation and tree clearing activities, are disturbing and will disturb northern long-eared bats and Indiana bats.

36. On behalf of myself and the Sierra Club West Virginia Chapter, I am distressed that the Forest Service is allowing activities to take place that are harming the bats' habitat and exacerbating the threats that these endangered bats already face. I am dismayed that the Forest Service is not following the law when it comes to permits that can hurt northern long-eared bats and Indiana bats because these bats are supposed to have federal protection.

37. My ability to enjoy candy darters, northern long-eared bats, and Indiana bats is entirely dependent on the continued existence of healthy, sustainable, and accessible ecosystems, habitats, and populations. If these and other species inhabiting the rivers and forests are affected by the coal hauling and mining, my ability to enjoy them is diminished as well.

38. My interests in the animals, environment, and ecosystems in this area is impaired by the Forest Service's failure to comply with environmental laws when it issued the road use permit to South Fork Coal Company, LLC. It is upsetting to see the Cherry River being harmed and to know that my opportunities to visit it and enjoy its beauty and biodiversity are being diminished by the coal hauling.

39. To remedy this situation, the Forest Service needs to withdraw the Road Use Permit that it issued to South Fork Coal Company, LLC and comply with applicable environmental laws. Specifically, the Forest Service needs to complete consultation with U.S. Fish and Wildlife Service that complies with the Endangered Species Act as to how the road use

permit may affect endangered species. It also needs to complete an environmental review that complies with the National Environmental Policy Act about the impacts of the permit.

40. I declare under penalty of perjury that the foregoing is true and correct.



James B. Kotcon, Ph.D.

Executed on the 21st day of November, 2024 in Morgantown, West Virginia.